No. 82-1788

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALABAMA POWER COMPANY, PETITIONER
v.
NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Nuclear Regulatory Commission acted reasonably in exercising its power under Section 105c of the Atomic Energy Act of 1954, 42 U.S.C. 2135(c), to impose conditions on petitioner's license to construct a nuclear power plant in order to avoid the creation or maintenance of a situation inconsistent with the antitrust laws.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 692 F.2d 1362. The opinion of the Nuclear Regulatory Commission's Atomic Safety and Licensing Appeal Board (Pet. App. A19-A101) is reported at 13 N.R.C. 1027. The decisions of the Commission's Atomic Safety and Licensing Board on liability and remedy, respectively (Pet. App. A102-A282), appear at 5 N.R.C. 804 and 1482.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1982. A petition for rehearing was denied on January 31, 1983. The petition for a writ of certiorari was filed on May 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Section 105c of the Atomic Energy Act of 1954, 42 U.S.C. 2135(c), provides that the Nuclear Regulatory Commission may withhold or condition a license to construct or operate a nuclear power plant if it finds that "activities under the license would create or maintain a situation inconsistent with the antitrust laws." 42 U.S.C. 2135(c)(5). In 1971, after petitioner had sought a license to build the Joseph M. Farley nuclear plant, the NRC, at the Attorney General's suggestion,[1] began proceedings to determine whether the plant's operation would create or maintain such a situation. More than 160 days of hearings were held before an NRC Atomic Safety and Licensing Board.

The Licensing Board determined that petitioner had monopoly power in the wholesale power market in central and southern Alabama. The Board identified five courses of conduct by which petitioner, exercising its monopoly power, restricted bulk power supply to disadvantage respondent Alabama Electric Cooperative (AEC), a non-profit cooperative that competes with petitioner in the wholesale supply of power.[2] Pet. App. A171-A193, A217,

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[1]The Attorney General, exercising his statutory responsibilities under Section 105c, had advised the NRC that it should begin such proceedings because there was evidence that petitioner had used its monopoly control over transmission facilities to preclude the growth of competition in the generation of electric power, and that granting the Farley applications might maintain or exacerbate an anticompetitive situation. Pet. App. A108-A110.

[2]The court of appeals summarized these as follows (Pet. App. A4-A5):

> (1) [Petitioner] engaged in "unfair methods of competition" by its threats to terminate service to AEC should AEC successfully compete to replace [petitioner] as a supplier to Fort Rucker in Alabama * * *; (2) certain contract provisions between [petitioner] and AEC and the municipal distributors were anticompetitive in regard to precluding alternate sources of supply

A229, A237, A249-A251. As a remedy, the Licensing Board conditioned the grant of the license on petitioner's providing AEC with unit power access[3] to the Farley plant and with the necessary access to petitioner's transmission system. *Id.* at A275, A277.

On appeal, the Atomic Safety and Licensing Appeal Board (Appeal Board) affirmed the bulk of the Licensing Board's findings and conclusions and agreed with the Licensing Board that conditions had to be imposed on the Farley plant license in order to prevent the maintenance of a situation inconsistent with the antitrust laws. The Appeal Board also found that petitioner had monopoly power in two other relevant markets (a coordination services market and a retail power market) and had engaged in two additional anticompetitive courses of conduct. Pet. App. A5, A33-A61, A64-A73. In response to petitioner's claim that its anticompetitive activities had ceased, the Appeal Board noted that these activities had in fact continued until as recently as 1976 and that it was necessary to " 'beware of * * * protestations of repentance and reform, especially when abandonment [of an unlawful practice] seems timed to anticipate suit, and there is probability of resumption.' "

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* * *; (3) part of a 1970 contract between [petitioner] and the Southeast Power Administration was an exclusive dealing arrangement and anticompetitive in nature and effect * * *; (4) between 1968 and 1972 [petitioner] refused to offer fair interconnection and coordination with AEC constituting anticompetitive conduct inconsistent with the antitrust laws * * *; and (5) in the mid and late 1960's [petitioner] precluded small utilities, including AEC and municipal distributors, from regional economic coordination * * *.

[3] "Unit power access" is the right to a predetermined percentage of the power output at a proportional share of the licensee's cost.

Id. at A94, quoting *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333 (1952).

The Appeal Board modified the remedy prescribed by the Licensing Board, specifying that petitioner's license be conditioned on its providing an ownership interest to AEC. (The Board also specified that AEC must, of course, compensate petitioner for this interest.) The Appeal Board explained that "of the types of arrangements for access to generating capacity generally found in the electric industry, ownership access is likely to be the most effective" means of "forestall[ing]" the "increase [of petitioner's] existing market dominance" and that an ownership arrangement "will enable AEC to compete more effectively." Pet. App. A92.[4]

The full Commission denied discretionary review (Pet. App. A283-A285), and the court of appeals affirmed (*id.* at A1-A13). The court ruled that "[t]he conclusions of the NRC concerning relevant markets * * * are amply supported in this extensive and thorough record. We affirm those findings and the holding that [petitioner] has exerted monopoly power * * * that could and probably would lead to antitrust situations." *Id.* at A12. The court also upheld the Commission's choice of a remedy. *Id.* at A13.

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[4]The Appeal Board also ordered petitioner to provide AEC with transmission services, because otherwise "AEC's system would be an island to itself, isolated from other power sources or systems." Pet. App. A95. The Appeal Board also decided that intervenor Municipal Electric Utility Association (MEUA) competed with petitioner at the retail distribution level, and as a means of lessening petitioner's monopoly control of the wholesale power supply market, it required petitioner to afford MEUA the right to use, on a compensable basis, petitioner's transmission facilities, and prohibited petitioner from using its transmission facilities to restrain MEUA from dealing with other wholesale suppliers. *Id.* at A96-A97.

In reaching its conclusions, the court of appeals rejected petitioner's argument that the Commission, in enforcing Section 105c, could consider only "the direct effects of the nuclear plant on the present or prospective competitive situation" and could not consider petitioner's anticompetitive activities in the years preceding the license application. The court explained (Pet. App. A9):

> We believe that the word "create" [in Section 105c] directs the NRC to look forward to see if an anticompetitive situation could arise. But the word "maintain" must direct the NRC to take a careful look at the present — and the past — to see if an anticompetitive climate exists and to see if the applicant has acted in an anticompetitive manner. * * * The amount of market power held by the applicant and the ways it has been used are relevant inquiries in determining whether there is a "situation" to maintain, and whether issuing this license will maintain it.

The court of appeals also rejected petitioner's contention that the Commission lacked the power to withhold or condition a license application under Section 105c unless there were actual, existing violations of the antitrust laws. The court reasoned (Pet. App. A10):

> Under the direction of the statute to determine if activities under the license will *create* a situation inconsistent with the antitrust laws, we have noted that a forward look toward potential anticompetitive results is required. Before issuing a license it is impossible to predict with absolute certainty that activities under the license will create an anticompetitive situation. For this reason, Congress did not intend that the NRC limit its concerns to activities which are mature violations of the antitrust laws.

Instead, the court said, the Commission "is to look only for 'reasonable probability' of violation" (*ibid.*).

On April 6, 1983, Justice Powell denied petitioner's application for a stay pending the filing of a petition for a writ of certiorari.

ARGUMENT

1. Petitioner acknowledges that, as the court of appeals stated, the issue presented by this case has not been decided by any other court. Pet. 9; Pet. App. A9. There is accordingly no conflict among the circuits. Moreover, contrary to the assertions of petitioner (Pet. 7-9) and its supporting amicus (EEI Am. Br. 3-4, 14),[5] the court of appeals' decision will not have any significant economic impact on the nuclear power industry. By 1980, the Commission had already conducted the antitrust review required by Section 105c for electric utilities that account for approximately 84% of the total kilowatt hour sales in the United States. 1980 NRC Ann. Rep. 76-77 (1981). No antitrust proceedings under Section 105c are now pending before the Commission, and there are no applications for licenses to construct commercial nuclear power plants pending before the Commission in connection with which an antitrust review under Section 105c has not been completed. Moreover, the Commission's staff is not aware of any planned applications for such licenses.[6] We would also note that there are numerous instances of joint ownership of nuclear power facilities,

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[5]"EEI Am. Br." refers to the brief of amicus curiae Edison Electric Institute.

[6]Section 105c also empowers the Commission to conduct an antitrust review at the time a nuclear power plant is licensed for operation, if significant changes have occurred since the construction permit was issued. But the Commission has, to date, never held an antitrust hearing at that stage.

and there is no evidence that joint ownership has diminished the safety of these plants or otherwise adversely affected their operation.

In any event, the Commission's antitrust findings against petitioner are based on its past conduct in its particular market setting. There is no reason to believe that that conduct is typical of the industry. Similarly, the Commission's decision to require ownership access was based on its assessment of the facts of this particular case, and does not suggest that the Commission will, contrary to past practice, require ownership access as a standard condition in the future.

2. Moreover, the court of appeals applied the correct statutory standards to the facts of this case. Petitioner (Pet. 10-19) and amicus (EEI Am. Br. 6-14) dwell on what they describe as the court of appeals' statements to the effect that traditional antitrust principles do not apply to antitrust analysis under Section 105c. But as even petitioner appears to acknowledge (see Pet. 12), the Commission, in its implementation of Section 105c, does not assert the authority to go beyond the standards that courts have developed in their interpretations of the antitrust laws; here, for example, the Commission explicitly relied on the antitrust criteria developed by the courts under the Sherman and Clayton Acts in evaluating petitioner's market power, anticompetitive behavior, and remedies. Thus, even if the court of appeals had committed the error petitioner alleges, its ruling would have no significance beyond this case.

More important, when the remarks of the court of appeals that petitioner emphasizes are placed in context, it is entirely clear that the court correctly construed Section 105c. For example, when the court of appeals said that Section 105c does not "call[] for or allow[] a traditional

antitrust analysis" (Pet. App. A10), it did so in connection with the conclusion that it then immediately stated—that Congress did not intend that the NRC limit its concerns to activities which are "mature violations" or "actual violations" of the antitrust laws but instead required a "forward look toward potential anticompetitive results." *Ibid.* This interpretation of Section 105c is plainly correct; as the court of appeals noted, the statute itself requires the Commission to "make a finding as to whether the activities under the license would *create* or maintain a situation inconsistent with the antitrust laws" (42 U.S.C. 2135(c)(5); emphasis added) and the legislative history shows that Congress intended the Commission to make a similar predictive "judgment [whether] it is reasonably probable that the activities under the license would, when the license is issued *or thereafter,* be inconsistent with any of the antitrust laws or the policies clearly underlying these laws." H.R. Rep. No. 91-1470, 91st Cong., 2d Sess. 14 (1970), quoted at Pet. App. A10 (emphasis added).

Thus the court of appeals was entirely correct in not insisting that the Commission must find an existing violation under traditional antitrust principles before it can impose conditions on a license; the Commission is entitled to attempt to predict the future effects of granting an unconditioned license. Petitioner acknowledges (Pet. 14-15), as it must, that the antitrust laws frequently require a court to estimate whether there is a reasonable probability that a proposed action will bring about an anticompetitive effect (see, *e.g., Brown Shoe Co.* v. *United States,* 370 U.S. 294, 323 n.39 (1962); *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U.S. 346, 356-357 (1922), quoted in *Standard Oil Co.* v. *United States,* 337 U.S. 293, 300-301 (1949)); the Commission's inquiry under Section 105c is no different.

Similarly, when the court of appeals stated that "a traditional antitrust enforcement scheme is not envisioned [by Section 105c], and a wider one is put in [its] place" (Pet. App. A11) it was explicitly elaborating the remark, found in the legislative history, that under Section 105c the Commission is to take into account both the letter of the antitrust laws and "the policies clearly underlying these laws" (H.R. Rep. No. 91-1470, *supra*, at 14). Petitioner does not suggest that the court misinterpreted the legislative history in this respect. At another point, the court made the plainly correct observation that, because of the background of a peculiar relationship between governmental control and private ownership in the nuclear power industry, antitrust principles "do not apply in the usual way to nuclear power regulation" (Pet. App. A12). None of these innocuous remarks was an erroneous statement of the law.

Petitioner attempts to link these remarks in the court of appeals' opinion to the court's rejection of its contention that state and federal regulation of its activities furnished it with a defense to the charges that it had violated the antitrust laws. See Pet. 16-19; see also EEI Am. Br. 12-13. In fact, the Commission correctly rejected this asserted defense on its merits, and there is no connection between this defense and the court of appeals' remarks about traditional antitrust analysis.

The Commission explicitly agreed with petitioner that the regulatory environment is a "factor which must be assessed in examining [petitioner's] activities" (Pet. App. A29). The Commission considered whether specific forms of regulation justified particular anticompetitive activity —for example, whether the regulation of retail power rates required certain of petitioner's acts (*id.* at A59-A61) and whether petitioner was accurate in its claim that some of its actions were a response to regulatory efforts to avoid unnecessary duplication of facilities (*id.* at A67-A68). To be sure,

the Commission did reject petitioner's suggestion that the mere fact that it was subject to regulation exempted it from antitrust scrutiny (see *id.* at A27-A29); but in reaching this conclusion, the Commission was following well established law. See, *e.g., Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973); *City of Mishawaka* v. *Indiana & Michigan Electric Co.,* 560 F.2d 1314, 1321 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978). There is no indication that the court of appeals' affirmance of these conclusions was based on anything other than the same well established principles. Petitioner's complaint is essentially that the court of appeals did not explicitly discuss each of its claims in detail, but the court was under no obligation to do so.

3. Petitioner also contends (Pet. 20-23) that the Commission failed to show the requisite nexus between its past anticompetitive activities and the prospective anticompetitive effects of issuing an unrestricted license for the Farley plant. But petitioner does not deny that the Commission's consistent interpretation of Section 105c, requiring " 'a reasonable nexus' " (Pet. 20, quoting *In re Louisiana Power & Light Co.,* 6 A.E.C. 619, 621 (1973)) between past violations and activities under the license at issue, is a correct construction of the statute. See Pet. 20-21. Here, the Commission, after examining petitioner's past actions, concluded that those actions were devoted to maintaining petitioner's market dominance and specifically stated (Pet. App. A92):

> [I]t can be expected that the addition of Farley to [petitioner's] generating capacity will over the years increase [petitioner's] existing market dominance. Thus, a key consideration here is the action we must take to forestall that expectation from becoming reality.

The Commission thus specifically found a nexus between petitioner's past anticompetitive activities and its proposed activities under the license; petitioner's objection can be

only that the factual basis of this finding is insufficient. See Pet. 21-23. That objection, having been rejected by the court of appeals, does not warrant further review by this Court.[7]

4. Finally, petitioner challenges (Pet. 27-29) the Commission's choice of licensing conditions. But Section 105c explicitly gives the Commission discretion to impose "such conditions as it deems appropriate" on a license (42 U.S.C. 2135(c)(6)). As the Appeal Board noted (Pet. App. A85-A86), courts and agencies charged with enforcing the antitrust laws have traditionally been empowered to adopt whatever remedy is needed to redress a violation and restore competition. See, *e.g.*, *United States* v. *E.I. DuPont de Nemours & Co.*, 366 U.S. 316, 334 (1961); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611-613 (1946); *In re Toledo Edison Co.*, 10 N.R.C. 265, 291-292 (1979). In conditioning the issuance of a license in the context of a pattern of previous anticompetitive behavior by the applicant, the Commission obviously must exercise similar authority in order to fulfill its statutory mandate to avoid creating or maintaining a situation inconsistent with the antitrust laws. The Appeal Board carefully explained why it considered joint ownership to be the appropriate remedy (see Pet. App. A89-A97), and petitioner fails to show that that determination was unreasonable.[8]

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[7]The Commission's finding that petitioner used its control over almost all the available power transmission facilities in the relevant geographic markets (Pet. App. A56-A61) to preserve its monopoly position was, for example, supported by such indicia of monopoly power as the fact that petitioner possessed 98% of the generating power in central and south Alabama, as well as other substantial evidence. See, *e.g.*, *id.* at A55-A61, A188-A191.

[8]Petitioner appears to object (Pet. 27-29) that the Commission took into account the tax benefits of joint ownership to AEC. This was a wholly appropriate consideration for the Commission to take into account; there is no rule that an agency, in formulating a remedy, must

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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negate advantages created by Congress. Cf. *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 17-18. On the contrary, the agency is justified in leaving the parties with the various competitive advantages and disadvantages — whether based on management skills, labor costs, or government benefits — that remain once the effects of anticompetitive situations are removed.

Contrary to the suggestion of amicus (EEI Am. Br. 11-12), the ownership condition does not give AEC a "free ride" on the innovative risk-taking of a rival. See *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). The initial risks in the development of nuclear power were taken by the United States at taxpayer expense, and AEC has, from the beginning, been willing to bear a proportional share of the risk associated with the Farley project.